No. 16200

United States Court of Appeals

for the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of J. J. KIMBLE, Bankrupt,

Appellant,

vs.

AMERICAN TRUST COMPANY,

Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—12-19-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

STANLEY M. McLEOD,
1015 Hearst Building,
San Francisco 3, California,

For Trustee and Appellant.

BROBECK, PHLEGER & HARRISON,
HOWARD J. FINN,
DAVID W. LENNIHAN,
111 Sutter Street,
San Francisco 4, California,

For Petitioner, American Trust Company.

In the Southern Division of the United States District Court for the Northern District of California.

No. 46274—In Bankruptcy

In the Matter of

J. J. KIMBLE,

Bankrupt.

PROOF OF CLAIM UNDER SECTIONS 62 AND 64a(3) OF BANKRUPTCY ACT

State of California,
City and County of San Francisco—ss.

T. C. Hudelson of the City and County of San Francisco, being first duly sworn, deposes and says:

1. That he is an Assistant Vice President of American Trust Company, a corporation duly organized and existing under the laws of the State of California and carrying on business at 464 California Street, San Francisco, California, and is duly authorized to make this Proof of Claim on its behalf.

2. That American Trust Company is a creditor of the above-named bankrupt and has heretofore and on September 14, 1956, filed herein a proof of claim.

3. That this proof of claim is in addition to said proof of claim heretofore filed.

4. That on or about September 14, 1956, claimant did file herein its Specifications of Objections

to Discharge; that said Specifications of Objections to Discharge did regularly come on for hearing on October 31, 1956, at which time, after proofs had been taken and evidence introduced, leave was granted to American Trust Company to file an amendment to its Specifications of Objections to Discharge and the cause was submitted; that on November 9, 1956, American Trust Company did file herein its amendment to its Specifications of Objections to Discharge; that said Specifications of Objections to Discharge, as amended, are as of this date under submission before this Court pending determination thereof.

5. That American Trust Company did employ as its attorneys for the purpose of representing it in the proceedings for Objections to Discharge the firm of Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, California, and has incurred an obligation to said firm for the payment of its attorneys' fees chargeable to said representation; that the amount of said attorneys' fees is $750.00 and is the reasonable value of the services rendered by said firm.

6. That in the event the above-named bankrupt's discharge is refused herein, such refusal shall be the result of the efforts of American Trust Company at its cost and expense.

7. That the cost and expense of American Trust Company in connection therewith consists of the following items:

$10.00, paid to Carolyn R. Blair, official reporter of the Referee herein, for transcripts of the testimony of the bankrupt given at various hearings.

$10.00, paid the Clerk herein as and for the filing fee for filing its Specifications of Objections to Discharge.

$1.50, paid Notary Public for verification of Specifications of Objections to Discharge, Amendment thereto, and Affidavit of David W. Lennihan filed pursuant to §62 of Bankruptcy Act.

$750.00, amount of fee of its attorneys as above set forth.

8. That such costs and expenses constitute a debt of the third priority as provided in Section 64a(3) of the Bankruptcy Act.

Wherefore, American Trust Company prays that the amount of said debt, to wit: the sum of $771.50, shall be retained by the Trustee herein until a final judgment granting or denying the discharge of the above-named bankrupt shall be made and entered, and that upon such final judgment the amount so retained shall, if such discharge be refused, forthwith be paid to American Trust Company and shall, if such discharge be granted, be disbursed in the ordinary course of administration.

/s/ T. C. HUDELSON,
Assistant Vice President.

Subscribed and sworn to before me this 20th day of February, 1957.

[Seal] /s/ MAUDE W. NASH,
Notary Public in and for the City and County of San Francisco, State of California.
My Commission Expires October 14, 1958.

Receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1957. Referee.

[Title of District Court and Cause.]

AFFIDAVIT OF ATTORNEYS FOR AMERICAN TRUST COMPANY, A CREDITOR HEREIN

State of California,
City and County of San Francisco—ss.

David W. Lennihan of the City and County of San Francisco, being first duly sworn, deposes and says:

1. That he is one of the attorneys for American Trust Company herein and is an associate of the firm of Brobeck, Phleger & Harrison;

2. That said firm was retained by American Trust Company to represent it and conduct proceedings to obtain denial of the discharge in bankruptcy of the above-named bankrupt;

3. That he did conduct such proceedings and in connection therewith did examine said bankrupt at the first meeting of creditors herein and at the hear-

ing on the Specifications of Objections to Discharge of American Trust Company herein;

4. That he did make other and further investigations of the facts material to said Specifications of Objections to Discharge; that he did prepare, serve and file said Specifications of Objections to Discharge and, with leave of this Court, an amendment thereto;

5. That he did make an examination of the authorities pertaining to the right of said bankrupt to discharge, in order to be able to urge upon the Court that such discharge should be denied;

6. That the reasonable value of the services rendered by the firm of Brobeck, Phleger & Harrison, as above set forth, is $750.00;

7. That no agreement nor understanding of any kind exists between said firm or American Trust Company and any other person whatever for a division of the compensation to which said firm is entitled for its services.

/s/ DAVID W. LENNIHAN.

Subscribed and sworn to before me this 20th day of February, 1957.

[Seal] /s/ MAUDE W. NASH,
Notary Public in and for the City and County of San Francisco, State of California.
My Commission Expires October 14, 1958.

Recipt of copy acknowledged.

[Endorsed]: Filed February 21, 1957, Referee.

[Title of District Court and Cause.]

ORDER SUSTAINING SPECIFICATIONS OF OBJECTIONS TO BANKRUPT'S DISCHARGE IN BANKRUPTCY AND DENYING SUCH DISCHARGE

It Appearing, and the court so finds, that J. J. Kimble, of the County of San Mateo, State of California, duly was adjudged a bankrupt, on a petition filed in the above-entitled court on March 15, 1956, and

It Further Appearing that, on October 31, 1956, after a hearing held the same day (after due notice to all directly interested persons) on the "Specification of Objections to Discharge" filed in the above-entitled matter on September 14, 1956, the opposition to the bankrupt's discharge was submitted for decision and judgment, after the opposing creditor, American Trust Company, had been granted permission to amend said specifications to conform to proof, and

It Further Appearing that said amendment since has been filed, and

It Further Appearing and the court so finds that the allegations set forth in the "Amendment to Specifications of Objections to Discharge" are true and correct and the court therefore, concludes, as matters of law, that said last mentioned specifications should be sustained and the bankrupt is not entitled to a discharge in bankruptcy,

It Hereby Is Ordered, Adjudged and Decreed:

1. That the aforesaid specifications, as amended, be, and they are, hereby Sustained, and

2. That the bankruptcy discharge of J. J. Kimble, the above-named bankrupt be, and said discharge is, Denied.

Dated: August 22nd, 1957.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed August 22, 1957, Referee.

[Endorsed]: Filed August 27, 1957, U.S.D.C.

[Title of District Court and Cause.]

TRUSTEE'S OBJECTIONS TO PRIORITY CLAIM OF AMERICAN TRUST COMPANY

To the Honorable the District Court of the United States for the Above-Entitled District, and Burton J. Wyman, Esq., Referee in Bankruptcy Thereof at San Francisco:

Now comes John O. England, Trustee in Bankruptcy of the estate of the above-named bankrupt, and objecting to the claim of the American Trust Company filed herein on or about the 21st day of February, 1957, in the sum of $771.50 as a debt of the third priority as provided in Section 64a(3) of the Bankruptcy Act, as grounds of objections alleges:

1. That said claim consists of the sum of $21.50 representing notary fees, reporter's fees and filing fees expended by said claimant in filing and prosecuting its Specifications of Objections to the Discharge of the above-named bankrupt, which Discharge has, as a result of such Objections, been denied; That said claim further consists of the sum of $750.00 being the amount of attorneys' fees incurred by claimant and which it is obligated to its attorneys, Brobeck, Phleger & Harrison, in the prosecution of said Objections to Discharge of the bankrupt; That your peitioner objects to said claim on the ground that it is not properly allowable in this proceeding for the reason that the estate of said bankrupt was not, in any way, benefitted by the actions of said claimant and the services rendered it by its said attorneys.

Wherefore, your trustee prays that said proof of claim be re-examined and following a hearing of the within objections an Order be made denying said claim, as entitled to priority or otherwise, to payment from the assets of this bankrupt estate, and for such other and further Order as may be proper.

/s/ JOHN C. ENGLAND,
Trustee.

/s/ STANLEY M. McLEOD,
Attorney for Trustee.

Duly verified.

[Endorsed]: Filed October 30, 1957, Referee.

[Title of District Court and Cause.]

STIPULATED FACTS IN CONNECTION WITH CLAIM OF AMERICAN TRUST COMPANY FOR REIMBURSEMENT UNDER SECTION 64A(3) OF THE BANKRUPTCY ACT.

1. The bankrupt was so adjudicated pursuant to a voluntary petition filed by him. American Trust Company, the claimant, is an unsecured creditor of the bankrupt's estate. Its claim was duly filed herein and allowed.

2. On June 26, 1956, the Referee in Bankruptcy gave to the claimant, the other creditors of the estate, the Trustee in Bankruptcy and the United States Attorney notice of the last day fixed by the Referee for the filing of objections to the bankrupt's discharge in the manner required by § 58B of the Bankruptcy Act.

3. The claimant believing that grounds existed for the refusal of the bankrupt's discharge retained attorneys and requested them on its behalf to initiate appropriate proceedings to obtain refusal of the bankrupt's discharge. Claimant's decision to retain attorneys was in fact a reasonable and proper one since it could not properly represent itself in connection with such proceedings and the attorneys selected by claimant to represent it were qualified and competent to do so.

4. Claimant did not seek or obtain approval from the Referee in Bankruptcy of its decisions to oppose

the discharge of the bankrupt and to retain attorneys to represent it in connection therewith, or of the qualifications of the attorneys selected by it.

5. The bankrupt's discharge was refused after the hearing on specifications of objections thereto filed by claimant and such refusal was obtained solely through the efforts and at the cost and expense of claimant. The costs and expenses of claimant incurred and paid in connection with its efforts to obtain refusal of said discharge amounted to $771.50, which included an attorneys' fee paid by it to its attorneys. The amount of said fee was reasonable.

6. No other creditor or party in interest filed specifications of objections to the discharge of the bankrupt or in any wise participated in proceedings to obtain refusal of such discharge.

7. The trustee in bankruptcy was not requested by claimant to conduct proceedings to obtain refusal of the bankrupt's discharge and said trustee did not conduct or in any wise participate in such proceedings.

8. The claimant duly filed its claim to be reimbursed for its said expenses incurred and paid in connection with its efforts to obtain refusal of the bankrupt's discharge, basing its claim upon the provisions of § 64A(3) of the Bankruptcy Act (11 U.S.C.A. § 104(a)(3)).

The foregoing statement of facts is stipulated to be true.

BROBECK, PHLEGER & HARRISON,
Attorneys for Claimant.

/s/ STANLEY M. McLEOD,
Attorney for Trustee.

Approved:

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed November 26, 1957. Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To: The Honorable Burton J. Wyman, Referee in Bankruptcy.

The petition of American Trust Company, a corporation, respectfully shows:

1. Your petitioner is aggrieved by the Order, Judgment and Decree of Burton J. Wyman, Referee in Bankruptcy, a copy of which Order is attached hereto as Exhibit A and made a part hereof by reference.

2. The Referee erred in respect to said Order in that:

A. The language of the Order, page 10 lines 19 through 26, as follows:

> "Had the trustee been the one who initiated and successfully carried forward the opposition

to the bankrupt's discharge and had the work of his attorney, in this regard, been of the same as that performed by the attorneys representing said creditor-bank, the court would have found, and allowed, as a reasonable fee for such services, the sum of $250.00, and no more, an extremely liberal allowance for the same kind of legal services as were performed herein!"

is contrary to the stipulated facts approved in writing by the Referee and is directed to an issue previously determined in favor of your petitioner.

B. Said Order, Judgment and Decree disregards the plain mandate of § 64A(3) of the Bankruptcy Act (11 U.S.C.A. 104A(3)).

Wherefore, your petitioner prays that said Order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to bankruptcy; that said Order be reversed; that the claim of petitioner under §§ 62 and 64A(3) of the Bankruptcy Act be allowed in full, and that your petitioner have such other and further relief as is just.

Dated: April 2, 1958.

AMERICAN TRUST COMPANY,

By /s/ T. C. HUDELSON,
Assistant Vice President.

/s/ DAVID W. LENNIHAN,
Attorneys for Petitioner.

Receipt of copy acknowledged.

[Endorsed]: Filed April 7, 1958, Referee.

In the Southern Division of the United States District Court, for the Northern District of California

No. 46274

In the Matter of

J. J. KIMBLE,

Bankrupt.

Before: Honorable Burton J. Wyman,
Referee in Bankruptcy.

Thursday, November 14, 1957. 2:00 P.M.

OBJECTION TO CLAIM OF
AMERICAN TRUST COMPANY

Appearances:

For the Trustee:
STANLEY M. McLEOD, ESQ.

For the Claimant:
DAVID W. LENNIHAN, ESQ.,
Representing MESSRS. BROBECK,
PHLEGER & HARRISON.

The Referee: Matter of the Objection to Claim of American Trust Company in the Kimble Matter.

Mr. McLeod: Ready.

The Referee: What are you claiming that under?

Mr. Lennihan: Section 64a(3) of the Bankruptcy Act.

The Referee: Read it to me.

Mr. Lennihan: I am reading an excerpt.

The Referee: I have it right here.

Mr. Lennihan: "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be - - - - (3) where (skipping) the bankrupt's discharge has been refused (skipping) upon the objection and through the efforts of one or more creditors (skipping) the reasonable costs and expenses of such creditors in obtaining such refusal."

The Referee: Funny; the latest amendment I have does not have that in.

Mr. McLeod: It was amended in 1949.

Mr. Lennihan: This has been in since 1938.

The Referee: I think you are away off.

Mr. McLeod: I copied it word for word just as you read it.

The Referee: Section 19. Clause a is amended to read——

Mr. Lennihan: Section 19 of what?

The Referee: Section 19; clause (1) subdivision a has been amended. [2*]

Mr. Lennihan: This is easy. I am dead right or dead wrong.

The Referee: I think you are dead wrong.

Mr. Lennihan: May I examine the statute? Is that all of the amendment?

The Referee: This is the amendment to the stat-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ute right there. The only person entitled to it now is the trustee.

Mr. Lennihan: I know the statute is as I read it.

The Referee: As it was.

Mr. Lennihan: "Subdivision a of Sec. 64 is amended to read as follows: (1)."

Well, that does not affect (3). Therefore (3) is as I read it. This is Subdivision a(1). I was reading Subdivision a(3).

Mr. McLeod: It is Subdivision a(3) that his application is based on. So far as I was able to determine, he is reading the correct language.

Mr. Lennihan: And not reading Section 64a(1), which has no bearing.

The Referee: Let's get the file itself and see what we have.

Mr. Lennihan: This is the first priority; then there is a second priority, wage claims; then a third priority upon which I rely.

Mr. McLeod: Which you just read?

Mr. Lennihan: Which I just read. There is a fourth priority, which is taxes.

The Referee: Wait a minute. Maybe I am wrong.

Mr. McLeod: I might say, Your Honor, I just copied this from Remington today. It says:

"Since the 1938 amendment of the Bankruptcy Act, certain attorneys fees for services rendered to creditors are undoubtedly allowable out of the estate, under a special third priority rating according to the costs and expenses of creditors in obtaining the refusal, revocation or vacation of the bankrupt's

discharge, defeating confirmation of an arrangement or wage earner's plan, and also accorded to the expense of any person producing evidence resulting in conviction of any person of certain offenses under the Act."

There was only one point in connection with this. Assuming that is the law, and the creditor is entitled to reimbursement of all costs and expenses of that person, including attorney's fees, the question arises in my mind whether or not such creditor must request the trustee to oppose the discharge first. If he refuses to take such action, then, secondly, whether or not the creditor or his attorney must apply to the court before proceeding.

Those are the only two facts that occur to me. I mean, there was some question about the right to attorney's fees and reimbursement.

The Referee: Well, the Act as I have it here does not concern that either. Oh, yes it does. I think your point is good on the other.

Mr. McLeod: I wondered about that. I don't like to object, even on technical grounds.

The Referee: I believe in technicalities. I think every court should apply the statute to the limit. I will give you time to look that up.

Mr. Lennihan: Let me clarify that. Let me know what I am fighting.

The Referee: He says first you should ask the trustee to do it and if he refuses——

Mr. Lennihan: I will address the Court on that score. The expense to the estate is identical whether the trustee is the moving party or a creditor.

The Referee: It does not say so. That may be so if you can show that you asked the trustee to do it.

Mr. McLeod: I have a statement here:

"A creditor's attorney, if he hopes to be paid out of the estate for taking over and performing the trustee's duties, should at least first make a demand on the trustee, and probably should likewise obtain leave of court."

Mr. Lennihan: I don't know that I can find a case saying that Mr. McLeod is right or wrong, but in the absence of a case saying he is right, there is no equity whatever in saying that he is.

The Referee: Have you a case?

Mr. McLeod: I read one, 48 Fed. (2nd) 741.

The Referee: Whether there is a case or not, I would hold that is so. You just cannot go in and represent a creditor without showing the trustee has refused to do it. I want to see the cases. If there are any cases that do hold it, I will hold against the Bank, because I believe it only benefited the Bank, not the estate.

Mr. Lennihan: I think the Act is expressive on that subject. Whether the estate benefited is a matter of speculation, because the ultimate question is whether at any time in the future, as a result of the activities of the Bank, the creditors may receive payment, which but for their activities, they would not.

May we move to another phase of this same subject, so I will know what we are faced with?

The Referee: Surely.

Mr. Lennihan: The second question, as I see it,

once the priority of payment is settled, is: Is the trustee required to make payment on account of the expenses of the Bank? If the law is that the trustee is required to do so, then the second question is: How much should be paid? Therefore, I would like us to address our attention to that so I might know.

The Referee: I will say that if I allowed it, I would allow that amount. So that question is out.

Mr. Lennihan: That is what I wanted to know.

The Referee: If it is legally allowable.

Mr. McLeod: Personally, I have no objection one way or the other, but being the attorney for the trustee, it is technically not proper for the trustee to say that a large payment be made.

Mr. Lennihan: May we stipulate, so I will know upon what record we are proceeding, that the items and amounts stated in the claim of American Trust Company are proper, assuming that it is an allowable obligation of the estate, the sole issue being whether it is an allowable obligation of the estate?

Mr. McLeod: I will state that we have no dispute over the fact that counsel and his client performed services and the amount for fees is one chargeable by your firm to the Bank. If the Court determines that is reasonable, I am satisfied.

Mr. Lennihan: In directing the reference as to reasonableness, then, it is agreed that they are reasonable, the items included in the expenses; the sole question is, are we entitled to it?

The Referee: Under the law.

Mr. Lennihan: Of course. In other words, if I

know what I am doing, I guess the procedure would be to address a memorandum to the Court, including a stipulation of facts.

The Referee: Yes.

Mr. McLeod: That would be agreeable to me.

Mr. Lennihan: I will prepare a stipulation at this time that the amounts are reasonable, and address it to Mr. McLeod with what my views of the law are.

The Referee: Very well.

(Submitted.)

[Endorsed]: Filed April 9, 1958, Referee.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE RELATIVE TO PETITION FOR REVIEW OF REFEREE'S ORDER, DATED MARCH 27, 1958

To: Honorable District Judge for the Northern District of California, United States.

I, Burton J. Wyman, one of the referees in bankruptcy of the above-entitled court and the referee primarily in charge of the above-entitled bankruptcy proceeding, hereby respectfully certify and report as follows:

This specific matter in said bankruptcy proceeding now is before a Judge of the above-entitled Dis-

trict Court, sitting as an appellate court* for the purpose of hearing and determining the following verified "Petition for Review":

"To: The Honorable Burton J. Wyman, Referee in Bankruptcy.

"The petition of American Trust Company, a corporation, respectfully shows:

"1. Your petitioner is aggrieved by the Order, Judgment and Decree of Burton J. Wyman, Referee in Bankruptcy, a copy of which Order is attached hereto as Exhibit A and made a part hereof by reference.

"2. The Referee erred in respect to said Order in that:

"A. The language of the Order, page 10, lines 19 through 26, as follows:

> " 'Had the trustee been the one who initiated and successfully carried forward the opposition to the bankrupt's discharge and had the work of his attorney, in this regard, been of the same as that performed by the attorneys representing said creditor-bank, the court would have found, and allowed, as a reasonable fee for

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*"In passing upon a petition for review of a referee's order, 'the proceeding is in substance an appeal from the court of bankruptcy—i.e., the referee—to the District Court.' In re Pearlman (C.C.A.) 16 F. (2d) 20, 21."

In re Big Blue Min. Co. (D.C., N.D., Calif.) 16 F. Supp, 50, 51.

(Opinion by St. Sure, District Judge.)

such services, the sum of $250.00, and no more, an extremely liberal allowance for the same kind of legal services as were performed herein!'

is contrary to the stipulated facts approved in writing by the Referee and is directed to an issue previously determined in favor of your petitioner.

"B. Said Order, Judgment and Decree disregards the plain mandate of §64A(3) of the Bankruptcy Act (11 U.S.C.A. 104A(3)).

"Wherefore, your petitioner prays that said Order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to bankruptcy; that said Order be reversed; that the claim of petitioner under §§62 and 64A(3) of the Bankruptcy Act be allowed in full, and that your petitioner have such other and further relief as is just.

"Dated: April 2, 1958.

"AMERICAN TRUST COMPANY,

"By /s/ T. C. HUDELSON,
"Assistant Vice President.

"BROBECK, PHLEGER & HARRISON,

"/s/ DAVID W. LENNIHAN,
"Attorneys for Petitioner."

[The verification, for the sake of as much brevity as appears possible, is intentionally omitted from this certificate and report.]

The original of the complained-of "Order, Judgment and Decree Disallowing 'Proof of Claim Under Sections 62 and 64A(3) of Bankruptcy Act' " (a copy of which is attached to the aforesaid petition for review, but omitted herefrom to avoid repetition) is inserted herein and reads as follows:

[Title of District Court and Cause.]

ORDER, JUDGMENT AND DECREE DISALLOWING "PROOF OF CLAIM UNDER SECTIONS 62 AND 64a(3) OF BANKRUPTCY ACT"

This matter is before the court under the following circumstances:

On February 21, 1957, there was filed in the above-entitled bankruptcy proceeding the following "Proof of Claim Under Sections 62 and 64a(3) of Bankruptcy Act":

"State of California,
"City and County of San Francisco—ss.

"T. C. Hudelson of the City and County of San Francisco, being first duly sworn, deposes and says:

"1. That he is an Assistant Vice President of American Trust Company, a corporation duly organized and existing under the laws of the State of California and carrying on business at 464 California Street, San Francisco, California, and is

duly authorized to make this Proof of Claim on its behalf.

"2. That American Trust Company is a creditor of the above-named bankrupt and has heretofore and on September 14, 1956, filed herein a proof of claim.

"3. That this proof of claim is in addition to said proof of claim heretofore filed.

"4. That on or about September 14, 1956, claimant did file herein its Specifications of Objections to Discharge; that said Specifications of Objections to Discharge did regularly come on for hearing on October 31, 1956, at which time, after proofs had been taken and evidence introduced, leave was granted to American Trust Company to file an amendment to its Specifications of Objections to Discharge and the cause was submitted; that on November 9, 1956, American Trust Company did file herein its amendment to its Specifications of Objections to Discharge; that said Specifications of Objections to Discharge, as amended, are as of this date under submission before this Court pending determination thereof.

"5. That American Trust Company did employ as its attorneys for the purpose of representing it in the proceedings for objections to discharge the firm of Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco 4, California, and has incurred an obligation to said firm for the payment of its attorneys' fees chargeable to said representation; that the amount of said attorneys' fees is

$750.00 and is the reasonable value of the services rendered by said firm.

"6. That in the event the above-named bankrupt's discharge is refused herein, such refusal shall be the result of the efforts of American Trust Company at its cost and expense.

"7. That the cost and expense of American Trust Company in connection therewith consists of the following items:

"$10.00, paid to Carolyn R. Blair, official reporter of the Referee herein, for transcripts of the testimony of the bankrupt given at various hearings.

"$10.00, paid the Clerk herein as and for the filing fee for filing its Specifications of Objections to Discharge.

"$1.50, paid Notary Public for verification of Specifications of Objections to Discharge, Amendment thereto, and Affidavit of David W. Lennihan filed pursuant to § 62 of Bankruptcy Act.

"$750.00 amount of fee of its attorneys as above set forth.

"8. That such costs and expenses constitute a debt of the third priority as provided in Section 64a(3) of the Bankruptcy Act.

"Wherefore, American Trust Company prays that the amount of said debt, to wit: The sum of $771.50, shall be retained by the Trustee herein until a final judgment granting or denying the discharge of the

above-named bankrupt shall be made and entered, and that upon such final judgment the amount so retained shall, if such discharge be refused, forthwith be paid to American Trust Company and shall, if such discharge be granted, be disbursed in the ordinary course of administration.

"/s/ T. C. HUDELSON,
"Assistant Vice President.

"Subscribed and sworn to before me this 20th day of February, 1957.

"/s/ MAUDE W. NASH,
"Notary Public in and for the City and County of San Francisco, State of California.

"My Commission Expires October 14, 1958."

The order, judgment and decree sustaining the opposition to the bankrupt's discharge and denying such discharge was based upon the following verified "Amendment to Specifications of Objections to Discharge":

"American Trust Company of the City and County of San Francisco, State of California, a creditor of the above-named bankrupt, pursuant to Rule 15b of the Federal Rules of Civil Procedure and leave of court first had and obtained, does hereby amend to conform to the evidence its Specifications of Objections to Discharge filed herein on September 14, 1956, by adding thereto the following ground of objection:

"1. On or about August 31, 1954, said bankrupt applied to American Trust Company for a loan in the sum of $5,000.00 and for the purpose of inducing American Trust Company to make said loan said bankrupt made and published to American Trust Company a statement in writing respecting his financial condition, a true copy of which is attached as Exhibit A to the Specifications of Objections to Discharge filed by American Trust Company herein on September 14, 1956, and made a part hereof by reference.

"2. In and by said statement in writing said bankrupt represented to American Trust Company, among other things, that he was doing and did do business as a sole proprietorship in that the assets described upon said statement in writing were and would be his property as such proprietor and that the value of said assets was $15,595.00.

"3. Said representations were materially false in that, whereas on the page of said statement headed 'Application for Credit—Business Loan' under the column headed 'Assets,' said bankrupt represented that he had total assets of the value of $15,595.00, in truth and in fact the item 'Cash on Hand' represented to be $5,000.00 and the item 'Real Estate' represented to be of the value of $6,000.00, constituted one and the same asset and not separate and distinct assets and the value of the total assets of said bankrupt was and is overstated by the sum of $5,000.00.

"4. American Trust Company believed said representations and in reliance thereon loaned to said bankrupt the sum of $5,000.00.

"Wherefore, American Trust Company prays that the application of said bankrupt for discharge be denied.

"AMERICAN TRUST
COMPANY,

"By /s/ O. WILLARD FRIEBERG,
"Assistant Vice President."

* * *

In the consideration of this specific matter, the court has availed itself of the rule in federal courts that such courts can take "* * * judicial notice of its own records (Bowe-Burke Mining Co. v. Willcuts, 42 F. 2d 394, 395; The Golden Gate (C.C.A. 9) 286, F. 105, 106; Freshman v. Atkins, 269 U.S. 121, 124, 46 S. Ct. 41, 42, 70 L. Ed. 193, 195) and in so doing has found that the herein trustee's attorney who is among the "top-flight" bankruptcy attorneys in San Francisco and who frequently has rendered, as he did herein, efficient services in the performance of his duties as attorney for receivers and trustees in other bankruptcy proceedings, as well as in the above-entitled matter, by court order, was paid, in the above-entitled bankruptcy proceeding, the sum of $125.00 as compensation for the legal work performed herein in aiding the receiver in the performance of the receiver's duties and the further sum of $256.12 as compensation for the legal work

performed in aiding the trustee in the performance of said trustee's duties, i.e., a total of $381.00.

Had the trustee been the one who initiated and successfully carried forward the opposition to the bankrupt's discharge and had the work of his attorney, in this regard, been of the same as that performed by the attorneys representing said creditor-bank, the court would have found, and allowed as a reasonable fee for such services, the sum of $250.00, and no more, an extremely liberal allowance for the same kind of legal services as were performed herein.

In the light of the circumstances shown by the record herein, however, and particularly in the light of the fact that the trustee, in this bankruptcy proceeding, never was asked, by the creditor-bank, or any of its attorneys, to inform said creditor-bank, or any of its attorneys whether he would, or would not, file an opposition to the herein bankrupt's discharge, based upon the creditor-bank's ground for opposition, or otherwise,* and, also, particularly in the light of the fact that neither said creditor-bank, nor any of its attorneys, ever applied to the bankruptcy court for authority, after good cause shown, to oppose, at the expense of the bankrupt's estate, said bankrupt's discharge, this court is firmly of the opinion that, if any allowance were made to the at-

*Section 47a of the Bankruptcy Act [11 USCA, § 75a(9)] . . . provides "Trustees shall . . . . (9) oppose at the expense of estates the discharges of bankrupts when they deem it advisable to do so . . ."

torneys for said creditor-bank, a precedent would be established that later, under circumstances the same as those present herein, frequently could, and (inasmuch as said precedent almost certainly would assure, out of bankrupt's estates, the payment of attorneys' fees to attorneys not appointed by the bankruptcy courts to represent anyone officially connected with bankruptcy proceedings involved) in all likelihood, frequently would, be used to justify like "by-passings" of the bankruptcy courts, and their protective supervision over the administration of bankruptcy estates, and the funds therein involved, thereby weakening, if not making entirely ineffective, the supervision that Congress unquestionably intended should be exercised by bankruptcy courts in administering bankruptcy proceedings. In passing, it is to be noted that the supervisory power of a referee in bankruptcy matters has been referred to by the Circuit Court of Appeals for the Ninth Circuit as "sweeping." Lines v. Falstaff Brewing Co., 233 F. (2d) 927, 931.

Moreover, it is to be remembered that if the attorneys for this creditor-bank, under the circumstances and condtitions herein present, legally and properly can be allowed the sum of $750.00, or any other lesser sum, to be paid out of the assets of this bankrupt's bankruptcy estate, then unquestionably a bankruptcy court, confronted with the same character of a record, that now confronts this bankruptcy court, being bound by the hereinbefore mentioned precedent, legally would be justified in

allowing attorneys' fees to seven different sets of attorneys, who, representing seven different opposing creditors, each basing its opposition on a ground different from that of the other six, had taken upon themselves to ignore (as did the creditor-bank and its attorneys herein) the trustee in bankruptcy and the particular bankruptcy court in charge of the thus fee-burdened particular bankruptcy proceeding.

It, Therefore, Hereby Is Ordered, Adjudged and Decreed that neither American Trust Company, nor its attorneys be allowed any sum whatsoever, to be paid out of the estate of the above-named bankrupt, for opposing the discharge of said bankrupt.

Dated: March 27, 1958.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed March 27, 1958, Referee.

The specific section of the Bankruptcy Act involved herein is that portion of Section 64 [11 U.SC.A., §104] which reads:

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be ..... (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through

the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under Chapter 9 of Title 18 of the United States Code, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence * * *"

REFEREE'S NOTES AND COMMENTS

1. In dealing with a situation such as the one presented herein, a referee in bankruptcy always must bear in mind (a) that "In the administration of the bankruptcy law, it is the policy of the courts to keep the administration expenses to the minimum, and unless this is done, the purpose of the act will be defeated. Economy is strictly enjoined, and this policy should always be adhered to by the courts and the attorneys." In re Kentucky Electric Power Corp. (D.C., Ky.) 11 F. Supp. 528, 531, and (b) that "The statute* defines the groups that may be compensated, but this in no sense is to be construed as meaning shall be compensated * * *. Every case must stand upon its own bottom and is subject to the exercise of a sound judicial discretion by the trial court, subject to review in the event of abuse." In re Herz, Inc. (C.C.A. 7) 81 F. (2d) 511, 513.

2. It strictly has been ruled:

(a) "For administrative reasons Congress has wisely provided that the trustee shall have sole re-

*Section 64 of the Bankruptcy Act [11 USCA, §104].

sponsibility for administering the estate. The courts have therefore held that a creditor may be paid the costs of recovering hidden assets only when he has acted before a trustee is appointed or after the trustee, having been told of the hidden assets, has refused to take action.*" In re Joslyn (C.C.A. 7) 224 F. (2d) 223, 225.

(b) "If any creditor, petitioning or other, learns facts which lead him to suppose that property has been concealed, he may, and indeed he should, advise the receiver, and if the receiver proves slack, he may apply to the referee to stir him to action. The referee or the judge may thus authorize the creditor to proceed, and he will be entitled to his reward under section 64b(2), but not otherwise:*" In re Eureka Upholstering Co., Inc., (C.C.A. 2) 48 F. (2d) 95, 96.

3. If, as it appears from the record In re Eureka Upholstering Co., Inc., supra, the court therein (because of the failure and/or neglect of the allowance-seeking creditors first to have been authorized by the bankruptcy court to act independently of the receiver therein) refused any allowance to such creditors, in spite of the fact that such allowance-seeking creditors, through their own efforts were instrumental in bringing assets in the therein bankruptcy estate, does it not appear herein there was, and is, far greater justification, on the part of the herein referee in bankruptcy for refusing to

*Underlining referee's for emphasis.

make the herein sought-for allowance, wherein, as the record herein shows, the independent, court-unauthorized action on the part of the creditor-bank did not benefit the herein bankrupt's estate in the least?

Seemingly it is not to be overlooked herein, considered from a factual, as well as from the legal aspect of the situation, the aforesaid unauthorized-by-the-court independent action thus taken by the aforesaid creditor-bank, not only brought no benefit whatsoever to the herein bankrupt's estate, but conversely was of benefit to said creditor-bank, inasmuch as said action resulted in the removal of the legal barrier that the bankruptcy proceeding theretofore had raised against said creditor-bank and at the same time paved the way for said creditor-bank to proceed to collect its claim from the bankrupt who no longer is protected by his bankruptcy proceeding.

4. If the District Court, sitting as an appellate court herein shall determine that the herein referee in bankruptcy was justified in making the complained-of order, then it seemingly would appear that whether, or not, a fee of $250.00, or a fee in a greater amount, not to exceed the sum of $750.00, is reasonable need not be answered herein, the same having become moot.

See Southern Pac. Co. v. Eshelman (D.C., N.D., Calif.) 227 F. 928, 932, wherein it is said:

"However convenient or desirable for either party that the questions mooted in the case be authori-

tatively settled for future guidance, the court is not justified in violating fundamental principles of judicial procedure to gratify that desire. To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights, and although a case may have originally presented such a controversy, if before decision it has, through act of the parties or other cause, lost that essential character, it is the duty of the court, upon the fact appearing, to dismiss it. Mills v. Green, 159 U.S. 651, 653, 16 Sup. Ct. 132, 40 L. Ed 293; Kimball v. Kimball, 174 U.S. 158, 163, 19 Sup. Ct. 639, 43 L. Ed. 932; Jones v. Montague, 194 U.S. 147, 24 Sup. Ct. 611, 48 L. Ed. 913; Lloyd v. Dollison, 194, U.S. 445, 450, 24 Sup. Ct. 703, 48 L. Ed. 1062; Florida v. Georgia, 17 How. 478, 497, 15 L. Ed. 181; Security Life Ins. Co. v. Prewitt, 200 U.S. 446, 26 Sup. Ct. 314; 50 L. Ed. 545; California v. San Pablo, etc. R. R. Co., 149 U.S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747; Tennessee v. Condon, 189 U.S. 64, 23 Sup. Ct. 579, 47 L. Ed. 709; Little v. Bowers, 134 U.S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016.

"The principles finding expression in these cases have been thus aptly epitomized and stated in 2 Encyc. Sup. Ct. Rep. 289, where, referring to the rule uniformly followed by the Supreme Court, it is said:

" 'It has been the universal practice of this court to dismiss the case whenever it becomes apparent

that there is no real dispute remaining between the plaintiff and the defendant, or that the case has been settled or otherwise disposed of by agreement of the parties, and there is no actual controversy pending. In other words, whenever it appears, or is made to appear, that there is no actual controversy between the litigants, or that, if it once existed, it has ceased, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case. It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and when no relief can be afforded. Only real controversies and existing right are entitled to invoke the exercise of their powers.' ''

Papers Handed Up Herewith

Handed up herewith, as parts of this certificate and report, are the following:

1. American Trust Company's Proof of Claim Under Sections 62 and 64a(3) of Bankruptcy Act;

2. Trustee's Objections to Priority Claim of American Trust Company;

3. Notice of Hearing of Objections to Claim of American Trust Company;

4. Affidavit of Attorneys for American Trust Company, a Creditor Herein;

5. Stipulated Facts in Connection With Claim

of American Trust Company for Reimbursement Under Section 64a(3) of Bankruptcy Act;

6. Trustee's Opening Brief Relative to Claim of American Trust Company for Reimbursement Under Section 64a(3);

7. American Trust Company's Reply Brief in Support of Claim for Reimbursement Under Section 64a(3) of the Bankruptcy Act;

8. Trustee's Closing Brief;

9. Order, Judgment and Decree Disallowing "Proof of Claim Under Sections 62 and 64a(3) of Bankruptcy Act";

10. Petition for Review;

11. Reporter's Transcript Relative to Objections to Claim of American Trust Company for Fees.

Dated: May 1, 1958.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed May 1, 1958, U.S.D.C.

In the United States District Court, Northern District of California, Southern Division

No. 46274

In the Matter of

J. J. KIMBLE,

Bankrupt Debtor.

MEMORANDUM OPINION

Petitioner American Trust Company seeks reimbursement under Section 64A(3) of the Bankruptcy Act (11 U.S.C.A. 104(a) (3)) for its services rendered in blocking the bankrupt's discharge.

Petitioner, through its own attorneys, established to the satisfaction of the Referee in Bankruptcy, that the bankrupt had perpetrated a fraud in connection with certain loans made to him by petitioner. Under these circumstances the bankrupt was not entitled to his discharge and the Referee so held.

In 1938, Section 64A(3) of the Bankruptcy Act was amended to read as follows:

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * *

"(3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost

and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under chapter 9 of Title 18, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence * * *''

Petitioner contends that under the language of this section, the Court is authorized to award costs and attorney fees to it for the role it played in resisting the discharge of bankrupt. Although no case has construed the 1938 amendment under circumstances similar to those before the Court, text writers on the subject have stated views which are in accord with the position taken by petitioner.

> 6 Remington on Bankruptcy (5th Ed.) Section 2725, 3 Collier on Bankruptcy, Sec. 64, 303 (14th Ed.).

A subsidiary point raised in the petition is the amount of the attorney fees to be awarded. Petitioner asks $750 for services consisting of investigation of the bankrupt's financial affairs, preparation of a complaint and an amended complaint in the bankrutcy proceeding, legal research, and appearances before the Referee in Bankruptcy. The trustee himself does not question the reasonableness of the amount requested, although he states that a lesser sum would have been requested by him if he had performed the same services for the creditor. The Referee has stated that he would have

allowed a maximum of $250 to the trustee had he represented the same creditor in opposing the bankrupt's discharge. However, the Referee did not consider the question of reasonableness since he took the view that as a matter of law he was not authorized to award any compensation to petitioner for services performed in connection with the opposition to the discharge.

In denying the requested amount of petitioner, the Referee cited in re Joslyn, 224 F.2d 233, and quoted certain language at page 225:

"For administrative reasons Congress has wisely provided that the trustee shall have sole responsibility for administering the estate. The courts have therefore held that a creditor may be paid the cost of recovering hidden assets only when he has acted before a trustee is appointed or after the trustee having been told of the hidden assets, has refused to take action. In re Otto-Johnson Mercantile Co., 10 Cir., 48 F.2d 741; In re Eureka Upholstering Co., 2 Cir., 48 F.2d 95. The services for which petitioners seek compensation were performed after a trustee had been appointed. *The only action taken by the petitioners in opposition to the trustee was to urge a different means of distributing the estate. This effort by the appellants had nothing to do with bringing the concealed assets into the estate.*" (Italics ours.)

This language demonstrates on its face that the Joslyn case which interprets a different subdivision of the compensation provisions of the Bankruptcy

Act, is readily distinguishable. While it is correct to state that attorneys may only collect fees when specifically authorized by the Bankruptcy Act, petitioner observes that its request is based on express language in the Act, itself. This is correct.

The Referee would require a creditor to present his grievance to the trustee as a prerequisite to employing his own attorney. As in other sections of the Bankrutcy Act it might be desirable to have the trustee expressly refuse to take the requested action before a petitioner-creditor would be entitled to proceed on his own initiative. But the language of 64A(3) does not require that which the Referee believes is desirable. Cf. Gelson v. Rudin, 200 F.2d 31.

The attorney for the trustee would, himself, have been entitled to compensation for performing the identical services. Cf. In re Standard Fuller's Earth Co., 186 F. 578. The only question is one of amount. The Referee may control this. Cf. In re Weissman, 267 F. 588. The bankrupt's estate need not be impaired under the circumstances.

The services performed by petitioner's attorneys were availed of by the trustee. His passive or implied acquiescence in the procedures invoked by petitioner and the consequent acceptance of benefits, create a strong equitable base upon which to predicate the relief prayed for.

Accordingly, It Is Ordered that petitioner be reimbursed for attorney's fees in an amount to be fixed by the Referee in Bankruptcy.

Dated: July 10, 1958.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed July 10, 1958.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE IN BANKRUPTCY RESPONSIVE TO ORDER OF DISTRICT COURT OF JULY 10, 1958

To Honorable George B. Harris, United States District Judge for the Northern District of California:

Responsive to the following order made by Your Honor on July 10, 1958, "It Is Ordered that petitioner* be reimbursed for attorney's fees in an amount to be fixed by the Referee in Bankruptcy," and in accordance with, and pursuant to, said order of July 10, 1958, and having re-examined the record herein, including the "Proof of Claim Under Sections 62 and 64a(3) of Bankruptcy Act" (filed by American Trust Company), "Trustee's Objections to Priority Claim of American Trust Company," Affidavit for American Trust Company, a

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*The petitioner referred to is American Trust Company which herein petitioned the above-entitled District Court for a review of the referee's order, judgment and decree, dated March 27, 1958.

Creditor Herein," Stipulated Facts in Connection With Claim of American Trust Company for Reimbursement Under Section 64a(3) of Bankruptcy Act," Reporter's Transcript Relative to 'Objections to Claim of American Trust Company for Fees'," and, as the referee who had had charge of, and conducted the proceeding relative to the opposition to the bankrupt's discharge, bearing in mind, and making use of, the judicial knowledge of the character of the services performed and of the professional ability of the attorneys of the bank seeking reimbursement, I, as the referee in bankruptcy primarily in charge of the above-entitled bankruptcy proceeding, and in the light of all the circumstances present herein, hereby fix the sum of $250.00 as reasonable compensation for the said attorneys.

Dated: July 23, 1958.

Respectfully submitted,

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed July 23, 1958, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS

Notice Is Hereby Given that John O. England, Trustee of the estate of J. J. Kimble, Bankrupt, hereby appeals to the United States Court of Ap-

peals for the Ninth Circuit from the Order of the United States District Court for the Northern District of California, Southern Division, dated July 10, 1958, on Petition for Review of Referee's Order, dated March 27, 1958, reversing said Referee's Order.

Dated: August 5, 1958.

/s/ STANLEY M. McLEOD,
Attorney for John O. England, Trustee of the Estate of J. J. Kimble, Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 7, 1958, U.S.D.C.

[Title of District Court and Cause.]

ORDER DIRECTING PAYMENT OF ATTORNEYS FEE

The Certificate and Report of Referee in Bankruptcy, dated July 23, 1958, Responsive to Order of District Court of July 10, 1958, coming on this 12th day of August, 1958, regularly to be heard, Stanley M. McLeod, appearing as attorney for John O. England, Trustee in Bankruptcy of the above-entitled estate; no appearance on behalf of American Trust Company, petitioning creditor; and

It appearing that this Court heretofore, to wit: On the 10th day of July, 1958, directed that said American Trust Company be reimbursed for at-

torneys' fees in an amount to be fixed by the Referee in Bankruptcy, and said Referee having fixed the sum of $250.00 as reasonable compensation for services rendered in successfully objecting to the granting of a discharge to the bankrupt herein by the attorneys for said American Trust Company, and this Court having considered the matter,

It Is Hereby Ordered, Adjudged and Decreed that there shall be paid to the American Trust Company by the trustee of the above-named estate, the sum of $250.00, as compensation to its attorneys for opposing the discharge of said bankrupt.

Dated: August 20, 1958.

/s/ GEORGE B. HARRIS,
District Judge.

[Endorsed]: Filed August 20, 1958, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS

Notice Is Hereby Given that John O. England, Trustee of the estate of J. J. Kimble, Bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Northern District of California, Southern Division, dated August 20, 1958, directing said trustee to pay to the American Trust Company the sum of $250.00 as compen-

sation to its attorneys for opposing the discharge of the above-named bankrupt.

Dated: September 18, 1958.

/s/ STANLEY M. McLEOD,
Attorney for John O. England, Trustee of the Estate of J. J. Kimble, Bankrupt.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 18, 1958, U.S.D.C.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein:

Order Directing Payment of Attorney's Fee.

Certificate and Report of Referee in Bankruptcy Responsive to Order of July 10, 1958.

Memorandum Opinion.

Certificate and Report of Referee Relative to Petition of Referee's Order, March 27, 1958.

Trustee's Brief Relative to Claim of American Trust for Reimbursement.

Stipulation of Facts in Connection of American Trust for Reimbursement.

Recorder's Transcript—Objection to Claim of American for Fees.

Trustee's Objections to Priority Claim.

Proof of Claim Under Sections of Bankruptcy Act.

Affidavit of Attorneys for American Trust Company.

American Trust Reply Brief in Support of Claim.

Trustee's Closing Brief.

Petition for Review.

Order Sustaining Specifications of Objections to Bankrupt's Discharge.

Notice of Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said District Court, this 17th day of September, 1958.

[Seal] C. W. CALBREATH,
Clerk;

/s/ WM. J. FLINN,
Deputy Clerk.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

fornia, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal as designated:

Notice of Appeal on Order dated August 20, 1958.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 23rd day of September, 1958.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 16200. United States Court of Appeals for the Ninth Circuit. John O. England, Trustee of the Estate of J. J. Kimble, Bankrupt, Appellant, vs. American Trust Company, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed: September 17, 1958.

Docketed: September 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16200

JOHN O. ENGLAND, Trustee of the Estate of J. J. KIMBLE, Bankrupt,

Appellant,

vs.

AMERICAN TRUST COMPANY, a Corporation,

Respondent.

APPELLANT'S STATEMENTS OF POINTS TO BE URGED UPON APPEAL

To: American Trust Company, a corporation, and Brobeck, Phleger & Harrison, Its Attorneys:

You, and Each of You, Will Please Take Notice, under provisions of Rule 75 of the Rules of Civil Procedure for the United States District Court, that the Appellant, John O. England, Trustee of the estate of J. J. Kimble, Bankrupt, intends to rely upon the following points in his appeal to the United States Court of Appeals for the Ninth Circuit, from the Order of the United States District Court for the Northern District of California, dated July 10, 1958, reversing the Order of the Referee in Bankruptcy, and from the Order of the said United States District Court, dated August 20, 1958, directing the payment to said American Trust Company of attorneys' fees:

I.

That the District Court, in its Order of July 10, 1958, erred in reversing the Order of the Referee in Bankruptcy, dated March 27, 1958, disallowing "Proof of Claim Under Sections 62 and 62a(3) of Bankruptcy Act."

II.

That the District Court erred, in its Order of August 20, 1958, in directing the payment to respondent American Trust Company of the sum of $250.00 as attorneys' fees for opposing the discharge of said bankrupt, J. J. Kimble.

Dated this 13th day of October, 1958.

/s/ STANLEY M. McLEOD,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 14, 1958.